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No. 95-714

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

NATIONWIDE MUTUAL INSURANCE CO. and
NATIONWIDE MUTUAL FIRE INSURANCE CO.,
Petitioners,

v.

HENRY CISNEROS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.3 of the Rules of this Court, the Washington Legal Foundation and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief, as has counsel for Respondent Cisneros. Counsel for Respondents Steed, Brown, and the City of Dayton (the "Dayton Respondents") has declined to consent to the filing (albeit counsel provided a letter stating that the Dayton Respondents "do not object" to the filing), thereby necessitating the filing of this motion.

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. WLF devotes a substantial amount of its time to the promotion and preservation of free markets and market-oriented solutions to economic

problems. It believes that, in the great run of cases, the unfettered competitive market will produce the greatest good for the greatest number, including, in particular, consumers. To that end, WLF has appeared in this Court and other courts around the country in cases raising issues that affect the operation of markets and the opportunity for ordinary citizens to enjoy their benefits. *See e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1505 (1995); *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus curiae* before this Court on a number of occasions.

WLF and AEF seek to file the attached brief because of their interest in the operation of an efficient and competitive marketplace in which goods and services are allocated in a nondiscriminatory manner. They have no direct interest, financial or otherwise, in the outcome of this case and believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, WLF and AEF respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Dated: January 3, 1996

QUESTION PRESENTED

Amici, the Washington Legal Foundation and the Allied Educational Foundation, address the following questions only:

1. Whether the Fair Housing Act ("the Act"), 42 U.S.C. § 3601, *et seq.*, regulates the provision of property insurance.

2. Whether the interpretive regulations of the United States Department of Housing and Urban Development ("HUD"), which construe the Act to cover the business of insurance, are entitled to substantial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. WLF devotes a substantial amount of its time to the promotion and preservation of free markets and market-oriented solutions to economic problems. It believes that, in the great run of cases, the unfettered competitive market will produce the greatest good for the greatest number, including, in particular, consumers. To that end, WLF has appeared in this Court and other courts around the country in cases raising issues that affect the operation of markets and the opportunity for ordinary citizens to enjoy their benefits. *See e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1505 (1995); *Hartford Fire*

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The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus curiae* before this Court on a number of occasions.

Racial and other invidious discrimination has no place in a competitive marketplace. In a properly functioning market, irrational discrimination will tend to be driven out by more efficient, economically rational competitors. WLF and AEF believe that the operation of a competitive market can, and should, be strengthened by laws forbidding invidious and intentional discrimination. But WLF and AEF are concerned that increasingly intrusive federal regulation targeted at activity that, while free of discriminatory intent, is thought to have a "disparate impact," distorts rather than facilitates the operation of markets. Such regulation results not in the allocation of goods and services in a nondiscriminatory manner, but in a group-based "spoils" system.

This may be particularly so in the business of property insurance, where companies must draw distinctions between classes of insureds based on the risks each presents. This drawing of distinctions, undertaken in the development of underwriting criteria and the writing of policies, is designed to ensure that similarly situated people are treated similarly and that one class of risks does not unfairly subsidize another. If insurers are forced to abandon this long-standing objective of underwriting and actuarial practice in order to ensure equal treatment for the multiplicity

of groups protected under the Fair Housing Act regardless of risk, the market for insurance products will be distorted and insurance consumers will suffer.

STATEMENT OF FACTS

In the interest of judicial economy, WLF and AEF hereby adopt the Statement of the Case contained in the petition. In brief, the petition arises from a case seeking a declaration, and supporting injunction, that the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("the Act"), does not apply to the business of property insurance and that the Department of Housing and Urban Development ("HUD") has no authority to regulate insurance. Petitioners, two related national property insurers, brought this action in federal district court. A Magistrate Judge for the U.S. District Court for the Southern District of Ohio recommended, and the District Judge agreed, that the Petitioners' claim was ripe for review, but that their motion for summary judgment should be denied. The District Court held that the Act did apply to the business of property insurance and that HUD does have the authority to issue regulations affecting it. Appendix to Petition for Writ of Certiorari (hereinafter "Pet. App.") 85-92.

On appeal, a divided court of appeals affirmed. *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995); Pet. App. 1-29. The majority -- reaching the same conclusion as the Seventh Circuit in *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993), and rejecting that of the Fourth Circuit in *Mackey v. Nationwide Insurance Companies*, 724 F.2d 419, 423 (4th Cir. 1984) -- concluded, *inter alia*, that HUD's

interpretation that the Act did apply to the business of insurance was "reasonable" and entitled to substantial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). Pet. App. 17.

The majority concluded that § 3604(a) of the Act, which makes it unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling" because of race, color, religion, sex, familial status, or national origin, should be read to apply to the provision of property insurance; and that this construction of the Act, adopted by HUD, did not render other statutory language superfluous. The Court of Appeals concluded that neither the legislative history of the Act nor the subsequent refusal of Congress to extend the Act to expressly encompass insurance demonstrated the absence of a congressional intent to apply the Act to the business of insurance.

The Court of Appeals rejected Petitioners' argument that the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, preempted application of the Act to property insurance, concluding the application of the Act based upon a theory of disparate treatment (intentional discrimination) would not "invalidate, impair, or supersede any state law enacted to regulate the business of insurance" without express congressional authorization as required by the McCarran-Ferguson Act. It refused to consider Petitioners' argument that application of the Act on a disparate impact theory (basing a violation upon a disproportionate effect on a protected group even in the absence of discriminatory intent) should be preempted by the McCarran-Ferguson Act

because, in the majority's view, this question was not ripe for review.

After denial of their request for rehearing *en banc* of the panel's determination that their disparate impact McCarran-Ferguson preemption argument was not ripe for review, Pet. App. 94-95, Petitioners sought review of the Sixth Circuit's decision in this Court.

REASONS FOR GRANTING THE WRIT

I. THE APPLICATION OF THE FAIR HOUSING ACT TO THE BUSINESS OF INSURANCE MERITS REVIEW.

As the Seventh Circuit observed in *American Family*, insurance involves the categorization of risks and the distinction between groups thought to present different risks of loss:

> For example, term life insurance costs substantially more per dollar of death benefit for someone 65 years old than for one 25 years old, although the expected return per dollar of premium is the same to both groups because the older person, who pays more, also has a higher probability of dying during the term. Auto insurance is more expensive in a city than in the countryside, because congestion in cities means more collisions. Putting young and old, or city and country into the same pool would lead to adverse selection; people knowing that the risks they face are less than the average of the pool would drop out. A single price for term life insurance would dissuade younger persons from insuring, because the price would be too steep for the coverage offered; the remaining older persons

> would pay a price appropriate to their age, but younger persons would lose the benefits of insurance altogether. To curtail adverse selection, insurers seek to differentiate risk classes with many variables.

NAACP v. American Family Mut. Ins. Co., 978 F.2d at 290.

While no one believes that such insurance underwriting decisions should be based on race, the drawing of insurability distinctions related to risk is essential. While the characteristics of each individual insured are important, it is not possible to assess the actual risks posed by each individual. In addition, as the Seventh Circuit noted, the failure to appropriately distinguish among classes of risks will lead to adverse selection and drive up the cost of insurance.

Distinguishing among insureds on the basis of race is already forbidden by the laws of the individual states. Neither Ohio (in this case) nor Wisconsin (in the *American Family* case) nor any other State in the nation permits insurance companies to engage in discrimination on account of the race of an individual or the racial composition of the area in which his or her property is located. But application of the Fair Housing Act to the business of insurance threatens to impose obligations on insurers extending far beyond the mandate of race-neutral even-handedness imposed upon them by State law. While this Court has not resolved the question (*Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988)), both HUD (Pet. App. 135, 139, 141) and a number of courts have stated (in cases not involving property insurance) that the Act is violated not only by conduct undertaken with discriminatory intent, but also by acts which have a disparate impact

on different racial groups. *See e.g., Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *U.S. v. City of Parma*, 661 F.2d 562, 575-76 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982), *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *aff'd*, 488 U.S. 15 (1988); *Halet v. Wend Investment Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

Moreover, the Fair Housing Act concerns itself with far more than just race and color. The Act also prohibits discrimination on the basis of religion, sex, handicap, familial status, or national origin. 42 U.S.C. § 3604. Disparate impact analysis has generally been understood to apply to Fair Housing Act claims alleging these other types of discrimination as well. *See, e.g., United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992)(familial status discrimination).

In the face of these court decisions, reasonable insurers must structure their business practices to survive disparate impact scrutiny. As this Court recognized in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), parties subject to a clear position on the part of a regulator are left with no course but to change their practices rather than "follow their present course and risk prosecution."[1] *Abbott Laboratories*, 387 U.S. at 152. While *amici* believe that the Act should not, and hope that it will not, ultimately be interpreted by this Court to impose liability under a disparate

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[1] For these reasons, WLF and AEF agree with, but will not repeat, Petitioners' argument that their "disparate impact" McCarran-Ferguson claim is ripe for review.

impact standard or to have any application to the property insurance business, an insurer cannot afford to be so sanguine. HUD has made clear its intent to enforce the Act using such a standard, and that policy is having consequences for all property insurers.

A variety of traditional insurance practices can have a disparate impact on groups protected by the Act. In our society, there is often a statistical correlation between groupings addressed by the Act (such as race or familial status) and factors which might be relevant to marketing and underwriting of insurance, such as lower household income and housing values, older dwellings, higher frequencies of loss, etc. Although membership in a protected class does not "cause" these things, they do co-exist. To the extent that factors such as these are related to underwriting criteria traditionally relied upon by insurance companies, those criteria may have a disparate impact on groups protected under the Fair Housing Act and will be subject to regulatory or judicial attack.

Many insurance companies, for example, refuse to insure a property for an amount substantially in excess of its market value. To do so, they believe, creates a moral hazard. A homeowner with a $100,000 insurance policy on a $50,000 home stands to profit if he burns his house down and submits a claim to the insurance company. Although the overwhelming majority of people would not consider such an act, most insurers are unwilling to create an incentive that will tempt an unscrupulous few and turn a profitable book of business into a losing one.

Yet, such a policy may well have a disparate impact in older neighborhoods in central cities where the replacement cost of a home is high (because it may be large and

constructed of dated materials), while its market value is low. Such neighborhoods may be disproportionately inhabited by certain types of families (e.g., families with children), by the foreign-born, or by members of certain racial groups. Regulators attacking such rules will argue that no insurance company has ever statistically established a likelihood that over-insurance leads to a higher level of loss, but an insurance company could only test this proposition by conducting an experiment by which it deliberately overinsured properties and waited to see what happens. Such a company would be conducting an experiment with real money and, perhaps, creating an incentive for real arson. Even then, sorting out the impact of over-insurance with a certainty that will satisfy everyone is a difficult task in a complex world.

Similarly, many insurers believe that significantly increasing the number of occupants of a dwelling increases the risk of property damage. But any insurance company attempting to incorporate that belief into its underwriting decisions faces a substantial risk that it will be charged with handicap or familial status discrimination, because families with children and adult residential homes for the handicapped generally entail greater-than-average number of residents per living unit.

Insurers faced with such onerous obstacles may choose not to "validate" but to abandon business practices that have served them and their policyholders well for many years. In response to this and to the specter of expensive and crippling administrative enforcement, insurers may find themselves under increasing pressure to "insure by the numbers" and thereby avoid regulatory scrutiny. Those faced with enforcement actions may decide that the more prudent course is to pay whatever is demanded as the price

of peace with HUD and modify practices that have withstood the challenge of the market. To enter into expensive and market-distorting settlements will hurt not only the insurer, but all who participate in the market, including consumers.

Such an extraordinary federal intervention into an insurance industry traditionally regulated by the States should not occur without a finding of clear congressional intent and clear direction from this court.

Moreover, as noted above, the circuits are divided on this issue. The Sixth Circuit (in this case) and Seventh Circuit (in the *American Family* case) have held that the Act covers the provision of property insurance. The Fourth Circuit (in *Mackey*) reached the opposite conclusion. In light of the importance of the issues raised, the Court should grant the writ of certiorari in order to resolve this conflict.

II. THE SIXTH CIRCUIT'S DEFERENCE TO HUD MISCONSTRUES PRIOR DECISIONS OF THIS COURT

WLF believes that the language of the Act clearly indicates that it does not apply to insurance. As noted before, § 3604(a) makes it unlawful to refuse to sell or to rent or to "otherwise make unavailable or deny" a property on the basis of a number of different characteristics, including race, religion, familial status, and national origin. This language cannot reasonably be read to include the provision of property insurance. The statutory language, under any straight-forward reading, can only be construed to include conduct expressly mentioned by the statute, i.e., refusing to sell or rent a home and certain unspecified

conduct which itself makes a particular dwelling unavailable, *e.g.*, racial steering or exclusionary zoning. HUD has argued, however, that even conduct that neither involves the provision of a dwelling nor in and of itself makes the dwelling unavailable may be wedged into the language of § 3604(a) if, in conjunction with intervening events, that conduct contributes to the unavailability of housing. This argument tears § 3604(a) from the moorings of its language, applying it to a host of activities that have little to do with making dwellings unavailable.

Discrimination in the provision of property insurance does not, by itself, make a dwelling unavailable. At most, it makes the acquisition of financing more difficult. The inability to obtain financing, in turn, may make it more difficult to purchase a dwelling. But where would such an expansive interpretation stop? If homeowner insurers are included within the scope of § 3604(a) (because insurance indirectly affects the availability of housing), why should the statute not apply to the work of plumbers, electricians, and carpenters? Most homeowners cannot maintain their homes without their assistance. If hazard insurers are included within the sweep of § 3604(a), why not employers? It would be hard for most people to buy or keep a house without a job. Why not, for that matter, include lawyers, who are necessary to close the transaction? The simple language "denies or otherwise makes unavailable" does not give § 3604(a) such a long reach.

Under these circumstances, no deference to HUD's interpretation of the Act with respect to property insurance is warranted. Where, as here, statutory language is clear and unambiguous, no administrative interpretation is necessary. *Demarest v. Manspeaker*, 498 U.S. 184 (1991). Even "contemporaneous and long-standing agency

interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989).

But even were this not so, deference is only to be paid to an administrative agency's interpretation of congressional intent when the matters are technical and more fully understood by specialist agencies. The deference afforded by this Court in *Chevron* to the EPA's rule at issue -- that States might adopt rules treating pollution emitting equipment within the same industrial groupings as if they were encased in a single "bubble" -- is of little help here. The Court did not defer to the agency's determination until after it had exhaustively examined the statutory language and legislative history to determine that Congress had no intent with respect to the matter at issue. *See NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 123 (1987) ("our first job is to try to determine congressional intent, using 'traditional tools of statutory' construction").

The rule in *Chevron* is rooted in recognition of the EPA's technical expertise and years of experience in administering the statute in question. *Chevron*, 467 U.S. at 353-58. Where an agency interpretation is not based on an ongoing "operational program," substantial deference need not be afforded. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) ("legal question" warrants less deference); *Bowen v. American Hospital Association*, 476 U.S. 610, 642 n.30 (1986) (*Chevron* deference "predicated on expertise").

This court should make clear that *Chevron* deference is inappropriate when an agency is determining the extent of its jurisdiction. An agency "may not bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co.*

v. Barrett, 494 U.S. 638, 650 (1990) (citing *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). To permit, in a manner of speaking, the fox to guard the henhouse, would have implications beyond the question of applicability of the Act to the business of insurance. The question here is not how best to interpret ambiguous congressional intent with respect to delegated authority, but rather, how to construe a statute. This Court should make clear that such questions are for Congress and for judicial interpretation of congressional actions, not for regulatory agencies.

Moreover, to defer to HUD here would be to let it overrule a policy judgment Congress has made. HUD has repeatedly sought to amend the Act to apply to insurance and Congress has not done so. In the course of one of those efforts, Senator Howell Heflin remarked:

> I am aware that HUD has proposed regulations under Title VIII that would cover the business of insurance, a business the Senate has decided should not be addressed by this legislation. I hope it is clear from these proceedings that HUD should not attempt to achieve by regulation what the Senate has declined to do, namely, to amend Title VIII to cover the business of insurance.

Senator Heflin was prescient. This Court should not permit HUD to succeed in its attempt to end-run around Congress, and it should make clear that there are limits on the authority of an agency to determine the scope of its own jurisdiction.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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